No. 248

In the Supreme Court of the United States

OCTOBER TERM, 1942

THE UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM F. MONIA AND L. AUBREY WILLIAMS

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the District Court (R. 15–17) has not been reported.

JURISDICTION

The judgment of the District Court was entered June 5, 1942 (R. 14–15). A petition for appeal was filed on July 3, 1942 (R. 18–19), and was allowed the same day (R. 17–18). Jurisdiction is conferred on this Court by the Act of March 2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 401, 18 U. S. C. 682, known as the Criminal Appeals Act, and Section 238 of

the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. 345. Probable jurisdiction was noted on October 12, 1942 (R. 23).

QUESTION PRESENTED

The sole question involved is whether a person who appears in obedience to a subpoena before a grand jury investigating an alleged violation of the Sherman Act, and gives testimony under oath concerning in a substantial way the matter being investigated, obtains immunity from prosecution for that matter under the immunity provision of the Sherman Act, even though he does not claim his privilege against self-incrimination or in any way indicate an unwillingness to testify.

STATUTES INVOLVED

The Act of February 25, 1903, 32 Stat. 854, 904, 15 U. S. C. 32, provides in part that:

> * * * no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts [the Interstate Commerce Act, the Sherman Antitrust Act, and others]: *Provided further,* That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

The Act of June 30, 1906, 34 Stat. 798, 15 U. S. C. 33, provides that:

> * * * under the immunity provisions * * * [of the above Act and others] immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath.

SPECIFICATION OF ERROR

The District Court erred in holding that a natural person appearing in response to subpoena and giving testimony under oath before a grand jury investigating violations of the Sherman Antitrust Act thereby secures automatic statutory immunity from prosecution on account of any transaction, matter, or thing concerning which he testifies, without the need for invoking the constitutional privilege against self-incrimination provided by the Fifth Amendment, or otherwise indicating that his testimony is being given in consideration of securing statutory immunity from prosecution.

STATEMENT

This is a direct appeal by the United States from a judgment of the District Court for the Northern District of Illinois overruling the Government's demurrers to special pleas in bar filed by the appellees to an indictment charging them, and others, with a violation of Section 1 of the Sherman Act.

The indictment was returned on June 19, 1941. It charges American Meat Institute; Armour and Company; Swift and Company; Wilson & Co., Inc.; Chicago Subcommittee of the Joint Marketing Improvement Committee, Sheep Section; and a number of individuals, including the appellees, with a conspiracy to fix prices for the sale in the Chicago livestock market of live sheep shipped in interstate commerce to that market (R. 1–7). Appellee William F. Monia is described in the indictment as a sheep buyer employed by defendant Armour and Company (R. 2); appellee L. Aubrey Williams is described as an employee of a commission firm selling live sheep in the Chicago market, and an order buyer of sheep for a partnership engaged in order buying of sheep at the market (R. 3).

The appellee L. Aubrey Williams, on February 20, 1942, and the appellee William F. Monia, on February 28, 1942, filed special pleas in bar to the indictment (R. 8–10, 10–13). Each plea alleges that the appellee, in obedience to a subpoena duly served upon him, appeared as a witness on behalf of the United States before the grand jury investigating the matters charged in the indictment and gave testimony under oath concerning in a substantial way the transactions, matters, and things covered by the indictment. Each plea also alleges with some particularity the subject matter of the testimony given. It is unnecessary to set

out these particulars here, or to summarize the charges of the indictment, for no contention is made by the Government, either in its demurrers or in its argument below or here, that the testimony given did not concern in a substantial way the matters charged in the indictment.

The plea of appellee Williams also alleges that he is not learned in the law and did not consult counsel prior to testifying; he was not advised by Government counsel or any member of the grand jury or anyone else of his constitutional privilege; and he was not required by Government counsel or anyone else to waive, and he did not waive, the immunity provided by the immunity provision (R. 10). The plea of appellee Monia contains no such allegations.

On March 18, 1942, the Government filed demurrers identical in substance to both pleas (R. 13, 14). The main ground of the demurrers is that the pleas do not state facts sufficient to constitute special pleas in bar for the reason that they do not allege that the appellees made any claim of privilege against self-incrimination, and consequently neither the Fifth Amendment to the Constitution nor the immunity statute has any application.

The District Court on June 3, 1942, filed a memorandum opinion (R. 15–17), and on June 5, 1942, entered its order overruling the demurrers and dismissing the indictment as to both appellees

(R. 14–15). The court held that, under the plain words of the statute, the defendants could not be prosecuted, regardless of whether they had claimed the privilege, and that to construe the law otherwise would be "to lay a trap for the unwary." (R. 16.)

SUMMARY OF ARGUMENT

Under the Fifth Amendment to the Constitution, a person waives his privilege against self-incrimination unless he claims it on the witness stand. The object of the immunity statutes passed after this Court's decision in *Counselman* v. *Hitchcock*, 142 U. S. 547, was to provide a "full substitute" for the constitutional protection. But it was intended to grant immunity only for testimony which the Government would have been otherwise unable to obtain, not to offer "a gratuity to crime." *Heike* v. *United States*, 227 U. S. 131. In the light of the constitutional prohibition and the obvious purpose of the immunity acts, they should be construed as coextensive with the privilege against self-incrimination. Since the constitutional privilege is not effective unless claimed, the immunity is not granted by the statute where the witness does not claim it and is testifying voluntarily.

This position is supported by the unreasonable results which would follow if immunity were automatically granted under the statute without any claim of privilege. The Government often does

not know whether, or to what extent, a witness may have participated in a crime. If immunity is received without the privilege being claimed, the prosecutor runs the risk of unintentionally giving immunity; he is unable to determine in advance whether it is more desirable to obtain the testimony, thereby giving immunity, or to retain the right to prosecute the witness. The witness, however, has full knowledge as to his own conduct and as to whether he may be incriminated by his testimony. It is therefore fair to require him to claim his privilege and thus put the prosecutor on notice before he is compelled to testify and immunity is obtained.

Conflicting inferences may be drawn from the early legislative background of the immunity act. Of particular significance now is the requirement included in most immunity statutes since 1933 that the witness must claim his privilege before immunity is obtained. This addition, we believe, was not intended to change the substance of the law but to clarify the confusing situation presented by divided authorities. There is no reason to suppose that Congress would have intended a different and more restrictive immunity rule to apply to the enforcement of such important acts as the Interstate Commerce Act, the Sherman Act, or the Federal Trade Commission Act, as compared with the recent legislation, or to place greater restrictions upon the agency administer-

ing the Fair Labor Standards Act (which incorporates the procedural provisions of the Federal Trade Commission Act) than upon the National Labor Relations Board, the Bituminous Coal Commission, and most of the other agencies created during the same period.

ARGUMENT

The appellees appeared before the grand jury in obedience to subpoenas and gave testimony under oath which tended to incriminate them concerning the matters charged in the indictment returned by the grand jury. They at no time advised the Government that their answers would tend to incriminate them; they did not claim their privilege against self-incrimination; and they never disclosed or indicated an unwillingness to testify. Neither plea charges any bad faith or deception on the part of the Government or the members of the grand jury. There is nothing, apart from the issuance of the subpoena, which has frequently been held to be immaterial,[1] which in any way shows that the testimony was not voluntary.

[1] It is clear that the subpoena in itself is not sufficient to make the testimony compulsory for purposes of self-incrimination. A subpoena does not compel incriminating testimony; it merely compels appearance. For this reason, it has always been the rule that the privilege against self-incrimination is no defense to a subpoena, but can only be raised with respect to particular questions propounded. *O'Connell* v. *United States*, 40 F. (2d) 201, 205 (C. C. A. 2) certiorari granted 281 U. S. 716, dismissed per stipulation, 296 U. S. 667; *Thompson* v. *United States*, 10 F. (2d) 781, 783 (C. C.

On these facts the appellees contend, and the District Court held, that they secured immunity. This view rests on the proposition that the immunity statute provides immunity for anything concerning which a witness testifies, even though the testimony is not compelled but is given voluntarily. It is the position of the Government, on the other hand, that the immunity statute does not extend to testimony voluntarily given, but that it applies only when the witness claims his privilege or at least indicates an unwillingness to testify for fear of self-incrimination and the Government then compels the testimony.

I

THE HISTORY OF THE IMMUNITY CLAUSE

It has long been recognized that the privilege against self-incrimination, both at common law and under the Fifth Amendment, is waived if not claimed by the witness on the stand. *United States ex rel. Vajtauer* v. *Commissioner,* 273 U. S. 103, 113; *United States* v. *Murdock,* 284 U. S. 141, 148; *Powers* v. *United States,* 223 U. S. 303, 314; 8 *Wigmore, Evidence* (3d ed. 1940), § 2276. If it is claimed, however, in the absence of a proper immunity statute the witness could not be

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A. 7), certiorari denied, 270 U. S. 654; *United States* v. *Kimball,* 117 Fed. 156, 164–165 (C. C. S. D. N. Y.); *United States* v. *Price,* 163 Fed. 904, 907 (C. C. S. D. N. Y.), affirmed 216 U. S. 488.

compelled to answer and the benefit of his testimony is lost.

The first immunity statute relating to judicial proceedings[2] was the Act of February 25, 1868, 15 Stat. 37, which became Section 860 of the Revised Statutes. This Act applied generally to all judicial proceedings, and provided in effect that no evidence obtained from a witness should subsequently be used against him in a criminal proceeding.[3]

In *Counselman* v. *Hitchcock*, 142 U. S. 547, this statute was held unconstitutional because the information obtained through the testimony might be used to build up a case against the witness based on other evidence; since the witness was still subject to prosecution, the statute was not

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[2] The earliest immunity statute was enacted in 1857; it related to testimony before either House of Congress. Act of January 24, 1857, 11 Stat. 155, as amended by Act of January 24, 1862, 12 Stat. 333 (2 U. S. C. 193; 28 U. S. C. 634).

[3] Senator Frelinghuysen, reporting the bill orally, stated that it had been discovered in some suits of the United States, where disclosures had been sought from parties, that they had interposed the plea that making disclosure would subject them to forfeiture and penalties; that the courts had recognized such a plea as a sufficient defense against making discovery, and that to "obviate that difficulty and in order that the Government may get such information as is necessary, this bill has been requested on the part of the Government and approved by the Judiciary Committee." See *Cong. Globe*, 40th Cong., 2d sess., pp. 950–951. In the House, Representative Williams of Pennsylvania reported from the Committee on Judiciary as follows (*id.*, at 1334):

"I suggested there were reasons of state for the passage

deemed to "supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates" (142 U. S., at 586).

To meet the objection raised in the *Counselman* case Congress passed the Act of February 11, 1893, 27 Stat. 443 (49 U. S. C. 46), which related only to proceedings under the Interstate Commerce Act.[4] This statute, which was the model for subsequent immunity provisions up to 1933,

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of the bill. Perhaps I may be allowed to state upon this floor there are cases pending in other countries. There is one now pending in England, at the instance of the Government, in reference to the assets of the dead confederacy, where the testimony of parties who acted as agents of that Government, and owning property here, is necessary to make out the case. A bill was filed in equity, but it was pleaded by the party holding this relation that being a citizen of the United States he would be subjected to forfeiture under acts of Congress with which members are familiar. An answer would necessarily involve the disclosure of his relation to the rebel government. On demurrer it was decided by the vice chancellor, and afterwards by the chancellor, that the party could not be held to answer. This testimony is important, and this bill is to put the party in such position that he shall be relieved from the liability to which he is now subject."

[4] The original Interstate Commerce Act of 1887 (24 Stat. 383) contained an immunity provision in the form held invalid in the *Counselman* case.

provided that "no person shall be *excused*" [italics supplied] from giving evidence which may tend to incriminate him, and then went on (p. 444)—

> But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided,* That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

In 1896 in *Brown* v. *Walker,* 161 U. S. 591, this Court held that the object of the constitutional provision "is fully accomplished by the statutory immunity" (p. 610), and that the 1893 statute was therefore valid.

In February 1903 similar immunity provisions were included in three additional statutes. The Act of February 14, 1903, 32 Stat. 828, which established the Department of Commerce and Labor, gave the Commissioner of Corporations the same investigatory powers as the Interstate Commerce Commission, and specifically incorporated by reference the immunity provisions of the 1893 act. These provisions were also restated verbatim in the Elkins amendment to the Inter-

state Commerce Act, adopted February 19, 1903, 32 Stat. 848. And in the general appropriations Act of February 25, 1903, 32 Stat. 904 (15 U. S. C. § 32), the paragraph providing appropriations for the enforcement of the Interstate Commerce Act, the Sherman Act, and other statutes, contained a proviso in the same language as the sentence of the 1893 immunity act quoted above.[5] See also p. 2, *supra*. This is the statute involved in the case at bar. There is no specific reference in the legislative history to the meaning of this proviso, and it must be assumed, as has been held by this Court,[6] that the Act was intended to have the same meaning as the original Act of 1893.

Shortly afterwards in *United States* v. *Armour & Co.*, 142 Fed. 808 (N. D. Ill. 1906), Judge Humphrey held that an investigation by the Commissioner of Corporations, pursuant to the Act of February 14, 1903, had granted immunity from the Sherman Act to officials of the meat packing corporations who had made evidence available without subpoena, but under the "compulsion" of the immunity act. In his opinion Judge Humphrey stated (142 Fed. 822–823):

> Now, in my judgment, the immunity law is broader than the privilege given by the fifth amendment, which the act was in-

[5] In 1902 it had been held that the 1893 immunity act did not apply to cases arising under the Sherman Act. *Foot* v. *Buchanan* (C. C. N. D. Miss.), 113 Fed. 156.

[6] *Heike* v. *United States*, 227 U. S. 131.

tended to substitute. The privilege of the amendment permits a refusal to answer. The act wipes out the offense about which the witness might have refused to answer. The privilege permits a refusal only as to incriminating evidence. The act gives immunity for evidence of or concerning the matter covered by the indictment, and the evidence need not be self-incriminating. The immunity flows to the witness by action of law and without any claim on his part.

* * * * *

The contention has been made that in order to get immunity the citizen shall wait until the compulsion becomes irresistible. That is the effect of the government contention. I am not able to bring my mind to accept that doctrine. If I am right in saying that immunity flows from the law, without any claim on the part of the defendant—and at different times that has been conceded here in argument—then no act of any kind on his part which amounts to a claim of immunity, which amounts to setting up a claim of immunity, is demanded by the law. * * * When an officer, who has a legal right to make a demand, makes such demand upon a citizen, who has no legal right to refuse, and that citizen answers under such conditions, he answers under compulsion of the law.

This decision was attacked by President Theodore Roosevelt, primarily on the ground that it applied to persons under investigation who had

testified without subpoena,[7] and on June 30, 1906, an Act was passed (34 Stat. 798, 15 U. S. C. 33) providing that all prior immunity statutes—

> shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath.

The view expressed in the *Armour* case that the statutory immunity was broader than the constitutional privilege was repudiated in *United States* v. *Heike*, 175 Fed. 852 (C. C. S. D. N. Y., 1910), 192 Fed. 83 (C. C. A. 2), affirmed, 227 U. S. 131. In that case a witness who testified before a grand jury investigating violations of the Sherman Act was subsequently indicted for the entirely separate offense of conspiring to defraud the customs. The Government attorneys investigating the antitrust matter had no idea that their inquiries might reveal violations of the other statutes. The district court overruled defendant's plea in bar, saying (175 Fed., at 858–859):

> The immunity provided by this statute was intended to afford an investigation without its being interrupted by the constitutional privilege of silence, or, in other words, under the Constitution, as under the common law, a witness is not obliged to incriminate himself. But to avail himself

[7] 40 Cong. Rec. 5500, quoted in 8 *Wigmore, Evidence* (3d ed. 1940) § 2282, p. 518.

> of that privilege he must ordinarily assert it. *United States* v. *Kimball* (C. C.) 117 Fed. 156, 163; *State* v. *Murphy*, 128 Wis. 201, 107 N. W. 470; 5 Wigmore on Evidence, § 2281a. Whether the immunity statute flows out to a witness testifying depends on circumstances. This statute of immunity must be administered with common sense; on the one hand, some questions are of such character that the witness would understand naturally and inferentially that he would be immune if he answered, and thus proceed to answer without asserting his right, while under other circumstances it would be his duty to assert it if he intended to rely on it. * * *

After the conviction of the defendant, the case came to this Court. This Court's opinion is discussed at some length, *infra*, pp. 31–34. Of significance here is the rejection of the petitioner's argument (227 U. S., at 132) that the immunity statute was to be construed more broadly than the constitutional privilege. Speaking through Mr. Justice Holmes, the Court said (227 U. S., at 142):

> Of course there is a clear distinction between an amnesty and the constitutional protection of a party from being compelled in a criminal case to be a witness against himself. Amendment V. ***But the obvious purpose of the statute is to make evidence available and compulsory that otherwise***

> *could not be got.* We see no reason for supposing that the act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned. We believe its policy to be the same as that of the earlier act of February 11, 1893, c. 83, 27 Stat. 443, which read "No person shall be excused from attending and testifying," &c. "But no person shall be prosecuted," &c., as now, thus showing the correlation between constitutional right and immunity by the form. That statute was passed because an earlier one, in the language of a late case, "was not coextensive with the constitutional privilege." *American Lithographic Co.* v. *Werckmeister,* 221 U. S. 603, 611. * * * [Italics supplied.]

If, as the above remarks show, the immunity act is to be deemed coextensive with the constitutional privilege, immunity will not be granted under the Constitution unless specifically claimed by the witness. A witness does not obtain the benefit of his constitutional privilege against self-incrimination until and unless he claims it. If the privilege is not claimed, the testimony is voluntary and can be obtained without the immunity statute.

After this Court's description of the scope of the earlier immunity acts the standard immunity pro-

vision was included in a number of statutes, including the Federal Trade Commission Act passed in 1914, and the National Prohibition Act.[4]

Between 1914 and 1933 (when the standard immunity provision was modified so as to deal specifically with the present problem (see pp. 27–29, *infra*)) a number of lower courts were called upon to decide whether these statutes granted immunity to a witness who had not specifically claimed his privilege.

The earlier cases held that the immunity was so restricted, relying in large part upon the passage quoted above from this Court's opinion in the *Heike* case. The opinion of Judge Grubb in *United States* v. *Skinner*, 218 Fed. 870 (S. D. N. Y., 1914), appeal dismissed, 242 U. S. 663, contains the most extensive discussion of the problem. In the *Skinner* case the Government contended that the words "no person shall be excused" on the ground that evidence might incriminate him, found

[4] These statutes are: Mann Act, June 25, 1910, 36 Stat. 826, 18 U. S. C. 402 (3); Federal Trade Commission Act, Sept. 26, 1914, 38 Stat. 722, 15 U. S. C. 49; Shipping Act, Sept. 7, 1916, 39 Stat. 737, 46 U. S. C. 827; National Prohibition Act, Oct. 28, 1919, 41 Stat. 317, 27 U. S. C. 47, repealed by Act of Aug. 27, 1935, 49 Stat. 872; China Trade Act, Sept. 19, 1922, 42 Stat. 854, 15 U. S. C. 155 (c); Grain Futures Act, Sept. 21, 1922, 42 Stat. 1001, 7 U. S. C. 15; Tariff Act, June 17, 1930, 46 Stat. 700, 19 U. S. C. 1333 (e); Perishable Agricultural Commodities Act, June 10, 1930, 46 Stat. 536, 7 U. S. C. 499m (f).

in the first sentence of the 1893 Act,[a] indicated that the immunity granted in the succeeding sentence was available only to those who "present their excuse upon this ground." (p. 874). Defendant contended that all persons who testified obtained immunity, irrespective of a specific claim. The court thought that "The language of the act is perhaps ambiguous," particularly in view of the opposing decisions of the district courts in the *Armour* and *Heike* cases (R. 874–875). After quoting from the *Heike* opinion of this Court to show that this Court regarded the immunity act as coextensive with the constitutional privilege, Judge Grubb's opinion continued (p. 876):

> It was to make available testimony that was unavailable because of the privilege of silence conferred by the terms of the fifth amendment to the Constitution. The testimony that was unavailable, because of that amendment, was that which the witness showed, to the tribunal demanding it, might reasonably tend to incriminate him. It was because such testimony could not be compelled, because of the constitutional amendment, that Congress acted. It was always competent for a person to voluntarily incriminate himself, and Congress was consequently not called upon to legislate with

[a] This sentence is not found in the Act of February 25, 1903, but the 1893 and 1903 Acts have always been regarded as having the same meaning. *Heike* v. *United States*, 227 U. S. 131.

> reference to incriminating testimony voluntarily given, but only with reference to incriminating testimony which the witness declined to disclose for that reason. The act of Congress of February 11, 1893, consequently, could only have been intended to cover testimony which the government was unable to obtain because of the declination of the witness to answer, based upon its incriminating tendency, and under the protection of the fifth amendment. * * * It was to remove this constitutional bar to the securing of testimony that Congress legislated; and with no purpose to bestow immunity in cases where doing so was not necessary to obtain testimony, which could otherwise be refused. It was not the purpose of Congress to excuse wrongdoing for any other reason than that it was otherwise impossible to secure evidence to punish greater wrongdoing or more wrongdoers. The enforcement of the law and the punishment of those who break it is so essential to the existence of government that it will not be presumed that Congress went further in the direction of exemption than the necessity of the case demanded.

In answer to defendant's contention that the immunity statute itself rendered futile any assertion of the constitutional privilege, Judge Grubb declared (pp. 878–879):

The defendants' contention, however, ignores the right of the government, the other party concerned, to have the witness assert his privilege before examination. It is still a valuable right from the government's point of view. The witness is clothed with an option to testify without asserting his privilege, in which event his testimony is voluntary, and entitles him to no immunity, or to testify only after the assertion of his privilege, and after its denial to him, in which event the evidence given by him is compulsory and entitles him to immunity. The government is entitled to know which option the witness selects. The government is also entitled to be informed, before the examination of the witness, that the witness claims the answer he is asked to give will tend to incriminate him, and in what way. The government is itself clothed with an option which cannot be intelligently exercised until there has been an assertion of privilege by the witness. It is entitled to know whether immunity will follow from the examination of the witness. It has the option to receive the testimony and thereby grant the immunity, or to reject the testimony and deny the immunity. The question of privilege cannot be determined until the witness has been summoned and sworn before the examining tribunal. Then for the first time the government must

make its election. In order to intelligently make the election, it must be apprised first as to whether the witness gives his testimony voluntarily for the purpose of exoneration, or involuntarily, because he would be compelled to testify if he refused. Only in the latter case would immunity flow from his evidence. If the witness fails to assert his privilege, the government would have the right to assume that immunity was not desired by him, and that permitting him to testify would not be attended with that result. If the witness claimed his privilege upon the ground of probable incrimination, then the government would be called upon to elect whether it would proceed with the examination, and so confer the immunity or whether it would abandon the questions and leave the witness unimmune. It could not make this election until it knew (1) that the witness was unwilling to testify, and (2) that and how it was claimed the desired evidence would tend to incriminate. This it could only learn from the witness' assertion of privilege.

* * * * *

* * * The witness is likely to have exclusive knowledge as to what facts and what answers may tend to his incrimination, and with reference to what offenses. Again, the witness alone knows whether he willingly gives his evidence for the purpose of exonerating himself, or only with the

> expectation of receiving immunity therefor. He is therefore in a better position to be called upon to assert his constitutional privilege than is the examining tribunal or the law officer of the government to call upon him to elect to do so. If any hardship attends the imposition of this burden on the witness, it has never been considered weighty enough to relieve him therefrom in exercising his constitutional privilege, prior to the immunity statutes. The immunity granted by the statute is a mere substitute for the constitutional safeguard, and has been held by the Supreme Court to be coterminous with it. * * *

Judge Grubb's decision in the *Skinner* case has been followed in a number of cases in the Southern District of New York. *United States* v. *Elton*, 222 Fed. 428 (S. D. N. Y., 1915); *United States* v. *Lay Fish Co.*, 13 F. (2d) 136 (S. D. N. Y., 1926) (A. Hand, J.); *United States* v. *Greater New York Live Poultry Chamber of Commerce*, 33 F. (2d) 1005 (S. D. N. Y., 1929); see also *United States* v. *Lee*, 290 Fed. 517 (N. D. Tex., 1923) affirmed on other grounds, *sub nom. Sherwin* v. *United States*, 297 Fed. 704 (C. C. A. 5), affirmed, 268 U. S. 369. The *Skinner* case also seems to have been cited with approval, though not on the point in question here, in *United States ex rel. Vajtauer* v. *Commissioner*, 273 U. S. 103, 113.

The Circuit Court of Appeals for the Fourth Circuit came to the same conclusion in 1925 in a

case involving the identical immunity provision in the National Prohibition Act. *Johnson* v. *United States*, 5 F. (2d) 471 (C. C. A. 4, 1925). After examining the earlier legislation and the *Armour* and *Heike* opinions, the Circuit Court of Appeals declared (p. 477):

> [The constitutional] privilege would have been to have done either one of two things; to have testified voluntarily or to have refused to testify on the ground of his constitutional privilege. The act was not intended to deal with the cases in which he chose to do the former. Its one object was to meet the situation which arose when the witness elected to claim the right which the Constitution gave him. It was not intended to relieve from the possibility of punishment under other circumstances, or as the Supreme Court said, it did not offer a gratuity to crime.
>
> A construction should not be given to it which would result in a grand jury or prosecuting officer unwittingly conferring immunity upon a serious offender because in the best of good faith, and with no reason to suppose that he was criminally involved in the transaction, he was subpoenaed to produce some documents or to give some testimony which perhaps could just as well have been obtained from other sources. Unquestionably the witness has the constitutional right to object to testifying. Then it is open to the government to elect whether it will or will not proceed with

> his examination under the statute, but if it does not, his rights remain as they were before he was called to the stand.

The conclusion that a witness does not obtain immunity unless he claims his privilege has also been reached by Professor Wigmore in both the earlier and the most recent editions of his treatise on evidence. He states:[10]

> The reason is that the anticipatory legislative pardon or immunity is not authorized absolutely, but only conditionally upon and in exchange for the relinquishment of the privilege. The Legislature did not intend to give something for nothing, *i. e.* to give immunity merely in exchange for a testimonial disclosure which it could in any event have got by ordinary rules or by the witness' failure to insist on his privilege. The immunity was intended to be given solely as the means of overcoming the obstacle of the privilege; and therefore (irrespective of the precise formality of the judge's procedure) could not come into effect until that obstacle was explicitly presented and thus needed to be overcome. * * *

The first (apart from the *Armour* case) of the cases taking the opposing view is *United States* v. *Pardue*, 294 Fed. 543 (S. D. Tex.), decided by Judge Hutcheson in 1923. Judge Hutcheson rejected the doctrine of the *Skinner* case in favor

[10] 8 Wigmore, *Evidence* (3d ed., 1940), Section 2282, pp. 510–511; (2d ed., 1923) Vol. 4, pp. 958–959; (1st ed., 1904) Vol. 5, pp. 240–241.

of the reasoning of the *Armour* opinion and decisions by the courts of New York and Wisconsin.[11] He said (294 Fed. 548–549):

> It appears, then, that here is the simple case presented: That following the very words of the statute, and proceeding in accordance with its exact requirement, this defendant under a subpoena having testified, and now claiming his immunity springing thereout, no greater and no different from what the statute says would follow his act, is met by the government with the proposition that he did not *claim anything* at the time he testified, and therefore he cannot now have it. The government, in short, wants to write a statute after the fact, saying: Congress did not mean what it said when it in plain language told you that, if you testified in obedience to a subpoena, you could not be prosecuted. What Congress meant to say is that, if you testify in obedience to a subpoena, and after you have told the commission that you do not want to testify, and after *you have claimed protection against self-incrimination*, you can then claim immunity from prosecution. With this contention I cannot agree.

[11] The New York decision relied upon was *People* v. *Sharp*, 107 N. Y. 427. The Wisconsin decision was *State* v. *Murphy*, 128 Wis. 201, decided by a sharply divided court, and overruled on this point in *Carchidi* v. *State*, 187 Wis. 438 (1925), and *State* v. *Grosnickle*, 189 Wis. 17 (1926). Judge Hutcheson also relied upon *United States* v. *Swift*, 186 Fed. 1002 (N. D. Ill.), but that case does not appear to support the proposition for which he cites it.

> * * * *Upon the controlling issue of fact in cases of this kind, however, whether a witness testified voluntarily or upon compulsion,* if a witness appears under a subpoena and is placed upon the stand by the Government, *the fact of compulsion is prima facie established,* and the *burden shifts to the Government to show that, notwithstanding all of the indicia of compulsory testimony, the witness in fact waived his privilege, and testified voluntarily.* [Italics in original.]

The *Pardue* case has been followed in *United States* v. *Moore,* 15 F. (2d) 593 (D. Ore., 1926) and *United States* v. *Goldman,* 28 F. (2d) 424 (D. Conn., 1928). See also *United States* v. *Ward,* 295 Fed. 576 (W. D. Wash. 1924).

By 1933 the lines of conflicting authorities were well established.[12] The Securities Act passed in

[12] Decisions in the state courts are also in conflict. The following hold that the witness must claim his privilege. *State* v. *Grosnickle,* 189 Wis. 17, 206 N. W. 895 (1926); *Cardichi* v. *State,* 187 Wis. 438, 204 N. W. 473 (1925); *State* v. *Backstrom,* 117 Kan. 111, 230 Pac. 306 (1924); *Ross* v. *Crane,* 291 Mass. 28, 195 N. E. 884 (1935); *Hunter* v. *State,* 72 P. (2d) 399 (Okla. Cr.) (1937); *People* v. *Reggel,* 8 Utah. 21, 28 Pac. 955 (1892). Cf. *People* v. *Carter,* 297 Mich. 577, 298 N. W. 288 (1941).

Contra: People v. *Sharp,* 107 N. Y. 427, 14 N. E. 319 (1887); *Doyle* v. *Willcockson,* 184 Iowa 757, 169 N. W. 241 (1918); *Metz* v. *State,* 217 Ind. 293, 27 N. E. (2d) 761 (1940); *State* v. *Caprio,* 98 N. J. L. 13, 119 Atl. 81 (1922), affirmed, 99 N. J. L. 292, 130 Atl. 377 (1923); *Nelson* v. *State,* 41 Ohio App. 174, 180 N. E. 84 (1931); *Fine* v. *State,* 112 Tex. Cr. 652, 185 S. W. (2d) 156 (1929). Cf. *People* v.

that year for the first time dealt specifically with the present problem. Section 22 of that Act, which was originally to be administered by the Federal Trade Commission, inserted in the language used in the prior immunity statutes the proviso that the immunity was available to a person only "after having claimed his privilege against self-incrimination." 48 Stat. 86, 15 U. S. C. 77v (c). Most of the many regulatory statutes passed since 1933 have contained an immunity provision in the same language as the Securities Act.[13] The Fair Labor Standards Act and the Motor Carrier Act, to mention the most important, however, incorporated by reference the provisions of the

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Finkelstein, 299 Ill. App. 363, 20 N. E. (2d) 290, reversed on other grounds, 372 Ill. 186, 23 N. E. (2d) 34 (1939).

[13] Securities Exchange Act, June 6, 1934, 48 Stat. 900, 15 U. S. C. 78u (d); Communications Act, June 19, 1934, 48 Stat. 1097, 47 U. S. C. 409 (i); National Labor Relations Act, July 5, 1935, 49 Stat. 456, 29 U. S. C. 161 (3); Federal Power Act, Aug. 26, 1935, 49 Stat. 858, 16 U. S. C. 825f (g); Public Utility Holding Company Act, August 26, 1935, 49 Stat. 832, 15 U. S. C. 79r (e); Merchant Marine Act, June 29, 1936, 49 Stat. 1991, 46 U. S. C. 1124 (c); Bituminous Coal Act, April 26, 1937, 50 Stat. 87, 15 U. S. C. 838 (b); Natural Gas Act, June 21, 1938, 52 Stat. 829, 15 U. S. C. 717m (h); Civil Aeronautics Act, June 23, 1938, 52 Stat. 1022, 49 U. S. C. 644 (i); Railroad Unemployment Insurance Act, June 25, 1938, 52 Stat. 1107, 45 U. S. C. 362 (c); Social Security Act, August 10, 1939, 53 Stat. 1370, 42 U. S. C. 405 (f); Investment Company Act, August 22, 1940, 54 Stat. 842, 15 U. S. C. 80a–41 (d); Investment Advisers Act, August 22, 1940, 54 Stat. 853, 15 U. S. C. 80b–9 (d).

original Federal Trade Commission Act and the Interstate Commerce Act,[14] with the result that a few of the modern statutes do not contain the express proviso requiring the claiming of the privilege.

II

IMMUNITY IS NOT GRANTED TO A PERSON WHO TESTIFIES WITHOUT CLAIMING HIS PRIVILEGE

A. *The immunity legislation was not intended to give greater protection than is required by the Constitution.*

The immunity statutes are not to be construed as if they stood alone. The provision of the Fifth Amendment, traditionally interpreted to require the claiming of the privilege, is in *pari materia.* Just as two laws on the same subject must be given a harmonious interpretation, so must the Constitution and the immunity acts. It is not sufficient, therefore, to look solely to the words of the immunity acts without regard for their constitutional background. The constitutional immunity is the very subject of the statute.

Under the Constitution and the common law, a witness was required to claim his privilege

[14] The statutes since 1933 in which the old form still appears are: Motor Carrier Act, August 9, 1935, 49 Stat. 550, 49 U. S. C. 305 (d); Industrial Alcohol Act, August 27, 1935, 49 Stat. 875, 26 U. S. C. 3119; Fair Labor Standards Act, June 25, 1938, 52 Stat. 1065, 29 U. S. C. 209.

(*supra*, pp. 9–10). In these circumstances, the absence of Congress to insert a specific provision to that effect in the original immunity acts may be regarded as indicating that Congress assumed that, except where modified by the statutes, the long recognized rule as to the necessity of the claim would still stand. The subsequent inclusion of such a requirement in most of the immunity clauses enacted after the matter was presumably first brought to the attention of Congress, in 1933, confirms this view (see pp. 27–29, *supra*, pp. 40–42, *infra*).

It is apparent from the history of the immunity legislation that its purpose was to aid the Government in enforcing the laws by removing the obstacle of the privilege. The statute involved in the *Counselman* case did not go far enough to accomplish this. To satisfy the constitutional requirements Congress enacted the statute upheld in the *Brown* case. The sole object of the immunity provision was to enable the Government to compel testimony which could not otherwise be obtained because of the privilege. If a witness testifies voluntarily without claiming his privilege, no obstacle is presented; there is under such circumstances no reason for the operation of the immunity provision. If, however, the witness claims his privilege, the testimony can not be secured without the immunity statute; there is then occasion for the operation of the immunity statute to

enable the Government to get the testimony, if it so desires, in which event the witness obtains immunity. There is nothing in the legislative history which indicates that Congress intended to give a reward or bonus for testifying where no immunity is claimed or desired; there is nothing indicating an intention to give immunity for evidence which could have been obtained through failure or lack of desire of the witness to assert his privilege. It is not reasonable to assume that Congress intended to defeat its very purpose of making administration of the laws more effective by gratuitously immunizing individuals without the desired advantage of securing testimony which the Government would not otherwise have been able to get.

Support for this interpretation of the statute is provided by a consideration of the language of the immunity statute upheld in the *Brown* case. This statute reads: "No person shall be excused" from giving incriminating evidence; "But no person shall be prosecuted" for anything concerning which he produces evidence. The relation of these two passages demonstrates the correlation in the mind of Congress between the constitutional privilege and the immunity granted; Congress quite obviously had in mind an exchange of immunity for compulsory testimony. Although the language of the statute involved here is not the same, it is clear that its policy is identical. See *Heike* v. *United States*, 227 U. S. 131, 142.

The Act was so interpreted in the *Heike* case. In that case the defendant, who had been indicted for frauds on the revenue and a conspiracy to commit such frauds, pleaded in bar that he had testified and produced documentary evidence in response to a Government subpoena in a grand jury investigation of alleged violations of the Sherman Act. He contended that the words of the statute—that no person should be prosecuted for any matter "concerning which he may testify or produce evidence"—were broad enough to give him amnesty from liability for every offense connected in any degree with the matter concerning which he had testified, or at least for every offense toward the discovery of which his testimony led, even if it had no actual effect in bringing about the discovery (227 U. S., at 141). In support of this contention he argued that the immunity statute bore no analogy, either in conditions of acquirement or in mode of operation, to the constitutional privilege (227 U. S., at 132); and that Congress intended the immunity provision as a reward permitting some guilty persons to escape in order to secure the evidence desired (227 U. S., at 141). The Government contended, on the other hand, that the statute should be limited by the boundaries of the constitutional privilege.

The Court first considered the purpose of the immunity statute and its relation to the constitutional privilege, and concluded that "the obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be

got.[15] We see no reason for supposing that the act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned" (227 U. S. 131, 142). Applying the statute in accordance with this pronouncement, it was then held that the plea could not stand for the reasons that (1) the evidence in the former proceeding "did not concern the present one and had no such tendency to incriminate the petitioner as to have afforded a ground for refusing to give it"; and (2) the documents involved were documents of the corporation which were not protected by the constitutional privilege (p. 143).

The Court did not deny that the language of the statute, if given a literal construction, was broad enough to have included this evidence. In a loose sense the evidence could have been said to "concern" a "transaction, matter, or thing," for which the defendant was prosecuted. But this Court held that "When the statute speaks of testimony concerning a matter it means concerning it *in a substantial way, just as the constitutional protection is confined to real danger* and does not extend to remote possibilities out of the ordinary course of law" (227 U. S., at 144). [Italics supplied.] Thus by construing the provision as "coterminous with what otherwise would have been the

[15] See also *Brown* v. *Walker*, 161 U. S. 591, 610.

privilege (p. 142)," the Court limited application of the statute to evidence which was protected by the privilege, evidence which had such a "tendency to incriminate" the witness "as to have afforded a ground for refusing to give it" (p. 143).

Thus the rationale of the *Heike* case was that the statute gave immunity only for evidence that was privileged, although the statute itself did not contain any such express limitation. The same reasoning when applied to this case would seem to lead to the result that no immunity is given by the statute unless the privilege is claimed. If the privilege is not claimed, the testmony is voluntary and can be obtained without the immunity statute. It is only when the privilege is claimed and the evidence compelled that there is occasion for the operation of the statute. If the statute is not so limited, the result would be to extend a governmental bounty to violations of law by gratuitously immunizing people liable to prosecution; and, as this Court said in the *Heike* case, it cannot be supposed "that the act offered a gratuity to crime."

B. A construction of the statute which would give immunity without the claim of privilege would lead to unreasonable consequences

Our position is also supported by the unreasonable results which would follow if immunity were automatically furnished under the statute without

any claim of privilege. All statutes should, of course, be given a sensible construction and "a literal application of a statute, which would lead to absurd consequences should be avoided wherever a reasonable application can be given to it, consistent with the legislative purpose." *United States* v. *Katz*, 271 U. S. 354, 357; *Sorrells* v. *United States*, 287 U. S. 435. "General terms should be so limited in their application as not to lead to injustice * * * or an absurd consequence. It will always * * * be presumed that the legislature intended exceptions to its language, which would avoid" unreasonable results. "The reason of the law in such cases should prevail over its letter." *United States* v. *Kirby*, 7 Wall. 482, 486–487; *Church of the Holy Trinity* v. *United States*, 143 U. S. 457.

In grand jury proceedings the Government often does not know whether, or to what extent, a particular witness participated in the crime being investigated. Witnesses are frequently called because they hold positions of some responsibility with the organizations under investigation, and it may not be known what their testimony will be. Under such circumstances, if immunity applies without the privilege being claimed, the Government prosecutor proceeds at the constant risk of unintentionally giving immunity. Not knowing whether the answer will incriminate the witness, he cannot exercise any judgment as to whether immunity should be given

in exchange for the testimony or whether it would be preferable to lose the testimony and retain the right to prosecute the witness for his crime, if evidence showing his participation should be obtained from other sources. At the moment the answer is given the prosecutor would unwittingly have given immunity. Such a result would plainly work an unreasonable hardship upon the public. On the other hand, the witness has full knowledge concerning his participation in the offense. He is well aware as to whether his answer would tend to incriminate him. It is fair, therefore, to require him to claim his privilege and thus put the prosecutor on notice, thereby giving the latter an opportunity to elect between extending immunity or withdrawing the question.

The unreasonableness of applying the immunity statutes to testimony voluntarily given becomes even more apparent in a case where the incrimination of the witness relates to an offense other than that under investigation by the examining tribunal. Although those are not the facts in this case, the ruling of the court below would apply equally under both sets of circumstances. In such a case the government prosecutor quite obviously would not be in any position to anticipate all the crimes which the witness may have committed, nor the relation of the evidence sought to those crimes. Yet he would be required to proceed with his examination at the risk of giving immunity, without any intention whatever, for one or more

offenses of the witness. The witness, with full knowledge of the incriminating nature of his answers, could obtain complete amnesty for his crimes without ever putting the prosecutor on notice as to the circumstances.

In fact, under a strict interpretation of the immunity statute, without regard to the constitutional provision with which it must be construed, it would be within the power of the witness to use an investigation to purge himself of his crimes by taking every opportunity to give information concerning them. We do not suppose, of course, that a witness could obtain immunity by volunteering information which was not responsive to questions asked him. But the same result might well be accomplished even while giving responsive answers. No prosecutor could so limit his questions as not to give the opportunity for an answer incriminating under some statute, particularly when he has no knowledge as to the offenses which the witness may have committed.

In this connection it should be noted that in other respects it has been held that the immunity statutes cannot be given a strictly literal construction isolated from the Constitution. Although the statutory language is broad enough to give immunity to any person who testifies no matter by whom he may be called, it has been uniformly held that immunity is given under the

statutes only when the witness is called to testify on behalf of the Government, and not when the witness is called by another defendant. *Brady* v. *United States*, 39 F. (2d) 312, 314 (C. C. A. 8); *Smith* v. *United States*, 58 F. (2d) 735, 736 (C. C. A. 5), certiorari denied, 287 U. S. 617; *United States* v. *Ernest*, 280 Fed. 515 (D. Mont., 1922); *In re Petraeus*, 12 Cal. (2d) 579, 86 P. (2d) 343 (1939); *Ivey* v. *State*, 153 Miss. 41, 120 So. 449 (1929); *State* v. *Archambault*, 72 Mont. 259, 232 Pac. 1107 (1925); *Commonwealth* v. *Magistrate Hamburg*, 104 Pa. Super. 221, 158 Atl. 629 (1932); 8 Wigmore, *Evidence* (3d ed., 1940), p. 516. It would, of course, be absurd to interpret the statutes to give immunity to a witness called by a defendant, for under such a construction defendants could combine to immunize each other.

The fear of the District Court that to require the claim of privilege takes advantage of the witness or "lays a trap for the unwary" seems to be unfounded. The requirement that the privilege must be claimed stems from the Constitution, not from the statute; and it has always been the rule that the Government is not required to advise the witness of his constitutional privilege. The result of the decision below is that the immunity statute, although it does not expressly state whether or not the privilege must be claimed, eliminates this requirement and gives the witness immunity al-

though he voluntarily testifies and gives no indication that he desires to claim his privilege or that the testimony tends to incriminate him. The immunity statute was not intended to enlarge the rights of the witness, or to be expressive of or change the requirement concerning the claiming of the privilege. In this regard the statute neither lessened nor expanded the rights of witnesses; their position is the same as it was under the Constitution. The statute simply provides a means of obtaining testimony by extending immunity when the constitutional privilege is invoked. It gives the Government a choice, to be exercised in the public interest. The witness may be compelled to testify; if so, he may not be held accountable even though his testimony incriminates himself. Or he may retain the privilege and be liable for prosecution for the matters about which he fails to testify.

C. *The legislative background supports this conclusion*

Inasmuch as there was no definite statement of the legislative understanding on this point in connection with the 1903 Act itself, arguments based upon legislative history necessarily involve analysis of less direct manifestations of congressional intent.

It may be said that the early legislative background gives rise to conflicting inferences. The

appellees argued below that the failure to include an express requirement that immunity be claimed in the amendment adopted to avoid the effect of the *Armour* decision, despite the dictum by Judge Humphrey that the statute did not so require, indicates that Congress was content to let his opinion stand to that extent."[16]

We believe, however, that looked at as a whole, the legislative history supports our position. The history of the 1893 Act, in the light of what this Court had said in the *Counselman* opinion and the construction subsequently adopted in *Brown v. Walker, supra*, pp. 10–12, indicates that Congress was only seeking to comply with the constitutional mandate, as construed by this Court, and not to give immunity to a greater extent than necessary. The use of the original language, in statutes passed after the *Heike* decision had suggested that the immunity provision was to be coextensive with the constitutional privilege, also supports this construction.

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[16] That Congress recognized that there were other disputed questions, but intended this amendment only to clarify its intention with respect to the necessity of a subpoena, appears from the statement of Senator Knox, who sponsored the amendment. He stated (40 Cong. Rec. 7657):

"Mr. President, the purpose of this bill is clear, and its range is not very broad. It is not intended to cover all disputed provisions as to the rights of witnesses under any circumstances, except those enumerated in the bill itself. * * *"

Furthermore, the inclusion within most of the immunity clauses since 1933 of a specific requirement that immunity be claimed is a strong indication of the manner in which Congress always intended the immunity acts to operate. The legislative history of these recent provisions does not show why the change was made. It would seem likely, however, that it was because of the conflict in the decisions in the lower federal courts as to the interpretation of the earlier provisions. Evidently Congress thought it wise to express its intention clearly so as to eliminate all possibility of the contention that the statute extended immunity automatically.

We believe it clear that the addition of the specific requirement was not intended to change the substance of the law, but to conform the statute to the original intention of Congress.[17] There is no reason to suppose that Congress would have intentionally given the agencies charged with the enforcement of the Interstate Commerce Act, the Sherman Act, and the Federal Trade Commission Act less power or subjected them to greater restrictions than agencies administering such stat-

[17] Cases arising under the newer immunity acts have required that the privilege be claimed without suggesting that the procedure under the new immunity clauses was different from that under the old. *United States* v. *Shaw*, 33 F. Supp. 531 (S. D. Cal.) (Securities Act of 1933); cf. *United States* v. *Mary Helen Coal Corp.*, 24 F. Supp. 50 (E. D. Ky.).

utes as the Securities Act, the Securities Exchange Act, the Federal Power Act, or the Civil Aeronautics Act, to mention only a few. Moreover, Congress would not have been likely to have provided different immunity provisions for the Federal Trade Commission in administering the Federal Trade Commission Act and the Securities Act. Nor do we think it would have deliberately placed greater restrictions upon the administrator of the Fair Labor Standards Act of 1938 (which incorporates the procedural provisions of the Federal Trade Commission Act) than upon the National Labor Relations Board, the Bituminous Coal Commission, and most other agencies created during the same period. No reason can be suggested for attributing to Congress an intention to differentiate between one group of agencies and another in a matter of this kind, in a series of regulatory statutes enacted at about the same time.

All of these statutes are obviously designed to accomplish the same purpose, namely, to make available evidence which could not otherwise be obtained because of the privilege. There is no reason to believe that Congress thought it necessary, or intended, to give a broader immunity in one case than in another. The incorporation of the additional phrase, therefore, does not amount to a change in policy; rather, it is a more explicit expression of the manner in which Congress always intended the immunity statutes to operate.

Cf. *Jordan* v. *Roche*, 228 U. S. 436, 445–446; *Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455, 468–469; *Luckenbach S. S. Co.* v. *United States*, 280 U. S. 173, 182–183.

CONCLUSION

For the above reasons it is respectfully submitted that the judgment of the court below should be reversed.

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